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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARIE Z. BRANDSTETTER, individually, and as Trustee, etc.,	
Plaintiff, Cross-defendant, and Respondent,	**A103393** **A104289**
v.	
FRANK E. LEMBI et al.,	**(San Mateo County Super. Ct. No. 411164)**
Defendants, Cross-Complainant and Appellants.	

Tenants Frank E. Lembi and John Kockos (appellants) appeal a judgment by court trial terminating a commercial lease they entered into with landlord Marie Z. Brandstetter, individually, and as Trustee of the Brandstetter Family Trust dated September 22, 1993 (respondent), and denying appellants any recovery on their cross-complaint against respondent. Appellants contend the court erred in terminating the lease and in awarding respondent attorney fees. Largely due to the inadequacy of the record on appeal, we affirm.

BACKGROUND

On February 26, 1998, pursuant to a written lease agreement, respondent leased to appellants a commercial building on El Camino Real in Millbrae. The lease had an initial term of 10 years beginning March 1, 1998, and two options to extend the term an

additional 25 years. The lease specified an initial base rent of $5,000 per month and contained a schedule of subsequent rent increases. Pursuant to the lease, appellants were to perform 20 items of repairs, improvements and upgrades to the lease property specified in Exhibit B attached to the lease. The lease also contained provisions regarding sublease of the lease property and for attorney fees to the prevailing party in the event of any action arising out of the lease.

In November 1999, respondent filed her original complaint against appellants, the thrust of which was that appellants entered into a sublease with a third party without respondent's knowledge, consent and approval.

In March 2000, appellants answered and filed a cross-complaint against respondent alleging breach of contract, intentional and/or negligent interference with contractual relations and/or prospective economic advantage, and declaratory and injunctive relief. The gravamen of appellants' cross-complaint was that respondent's conduct prevented appellants from being able to obtain a subtenant, and was designed to interfere with the lease and with intent to cause appellants' performance of the lease to be more expensive and burdensome.[1]

On March 6, 2001, respondent served on appellants a three-day notice to quit that stated appellants were in default on the lease due to violating lease provisions 7.1, 8.2, 18.1 and 21.1.[2] The notice to quit stated, in relevant part: "[Respondent] requests to

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[1] The instant action was apparently consolidated with an action by sublessee NB3, Inc., against appellants and a cross-action by appellants against NB3, Inc. (the NB3 action). Both parties in the NB3 action were denied recovery on their claims. The NB3 action has no bearing on the instant case and NB3 is not a party to this appeal.

[2] Lease provision 7.1 provides in part: "[Appellants have] no obligation to make substantial changes to the Premises irrespective of cost and shall not be required to make changes which are estimated to cost in excess of $5,000, save for the items delineated in Exhibit 'B' attached hereto."

Lease provision 8.2 provides, in part: "Subject to the provision of the Paragraph entitled 'Damage or Destruction' and Paragraph 8.1 above, [appellants] at [their] sole cost and expense shall keep in good order, condition and repair the Premises and every part thereof . . . ."

declare the tenancy terminated and a termination of the lease is desired. [¶] Pursuant to the provisions of Code of Civil Procedure § 11.61.1(c),[3] the acceptance of partial payment does not waive any of [respondent's] rights, including the right to recover possession of the premises." (Underscoring omitted.)

On May 2, 2001, respondent was granted leave to file an amended complaint against appellants for breach of contract, declaratory relief, breach of the covenant of good faith and fair dealing, breach of lease, fraud and unlawful detainer. Pursuant to a court order dated that same date, the amended complaint was deemed filed and served. The gravamen of the amended complaint was that appellants failed to commence or complete any of the work delineated in lease Exhibit B, and improperly entered into a sublease with a third party. Respondent's amended complaint sought damages, termination of appellants' interest in the lease and restoration of possession to respondent.

In July 2002, a court trial on respondent's amended complaint and appellants' cross-complaint commenced. At the outset, respondent dismissed the unlawful detainer cause of action after the court found that the requisite notice had not been given. However, the court stated that the three-day notice, which respondent served on appellants several months prior to the date respondent filed her amended complaint,

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Lease provision 18.1 contains restrictions on appellants' assignment and subletting of the lease.

Lease provision 21.1 provides in part: ". . . [Appellants understand and agree] that immediately upon execution of this Lease, [they] shall, at [their] sole expense, have architectural drawings prepared, suitable for presentation to the City, containing a basic plan for the physical upgrade of the Premises, including the physical upgrade work set forth in Exhibit 'B,' attached hereto and incorporated herein by this reference. . . . Failure by [appellants] to perform any of the other work delineated in Exhibit 'B,' except as set forth above, shall constitute a material breach of this Lease. . . . [Appellants] shall, at [their] sole expense, be responsible for performing said physical upgrade work, and shall commence said work immediately following the inspection and approval by [respondent] of the architectural drawings to be provided by [appellants], as provided above. . . ."

3 The Code of Civil Procedure does not contain a "section 11.61.1(c)."

constituted adequate notice to appellants of their default under the lease, pursuant to lease provision 17.1.3.[4] The court also limited the scope of respondent's claims to the four lease provisions specified in the three-day notice to quit. The court determined that there was no justifiable reason for appellants' failure to perform its improvement obligations under the lease and that appellants' failure to perform constituted a breach of contract. The court also determined that appellants were not liable for fraud or breach of the covenant of good faith and fair dealing, and denied appellants any recovery on their cross-complaint. The court construed lease provision 17.2.2[5] as providing for termination if there is a default of the lease outside the unlawful detainer scheme.

On June 10, 2003, judgment issued terminating the lease, denying recovery of damages to respondent on the complaint and to appellants on the cross-complaint, and awarding respondent $80,000 in attorney fees and costs. The parties apparently did not request a statement of decision and none was provided.

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[4] Lease provision 17.1 provides: "The occurrence of any of the following shall constitute a material default and breach of this Lease by [appellants]: [¶] . . . [¶] 17.1.3. A failure by [appellants] to observe and perform any other provision of this Lease to be observed or performed by [appellants], where such failure continues for thirty (30) days after written notice thereof by [respondent] to [appellants]; provided, however that if the nature of such default is such that it cannot be reasonably cured within such thirty (30) day period, [appellants] shall not be deemed to be in default if [appellants] shall within such period commence such cure and thereafter diligently prosecute the same to completion."

[5] Lease provision 17.2 provides, in part: "In the event of any material default or breach by [appellants] as set forth in paragraph 17.1, [respondent] may at any time thereafter without limiting [respondent] in the exercise of any right or remedy at law or in equity which [respondent] may have by reason of such default or breach: [¶] 17.2.1. Maintain this Lease in full force and effect and recover the rent and other monetary charges as they become due, without terminating [appellants'] right to possession, irrespective of whether [appellants] shall have abandoned the Premises. . . . [¶] 17.2.2. Terminate [appellants'] right to possession by any lawful means in which case this Lease shall terminate and [appellants] shall immediately surrender possession of the Premises to [respondent]. In such event, [respondent] shall be entitled to recover from [appellants] all damages incurred by [respondent] by reason of [appellants'] default . . . ."

Thereafter, appellants moved for new trial and to "set aside and vacate judgment and enter another and different judgment." At a July 17, 2003 hearing, the court denied the motion to set aside and vacate the judgment after finding there was no waiver by respondent of the right to terminate the lease. On July 21, appellants filed their notice of appeal from the judgment.

On August 11, 2003, the court denied appellants' motion for new trial. That motion had rested on the ground that respondent prevailed only on its sixth cause of action and that cause of action did not plead termination of the lease. On October 10, 2003, appellants filed a notice of appeal from the court's denial of the motion for new trial. In December 2003, this court ordered appellants' appeals consolidated.[6]

DISCUSSION

I. *The Lease Was Properly Terminated*

A. *Rent Paid and Work Performed*

Appellants contend the court erred in ordering the "drastic remedy" of terminating the lease agreement. They assert that at the time the lease was terminated they had paid more than $200,000 in rent, and argue that as a result of the termination of the lease they "did not realize profits for the substantial consideration of the rental payments of $200,000 and work performed on the premises." As evidentiary support for their contention they improperly cite to their memorandum of points and authorities submitted below.

The fundamental problem with appellants' argument is that there is no reporter's transcript of the evidentiary portion of the trial.[7] Consequently, the judgment is conclusively presumed correct as to all evidentiary matters; it is presumed that the

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[6] We reject respondent's assertion that appellants' appeal from the denial of the new trial motion should be dismissed because an order denying a motion for new trial is not appealable. Instead, we exercise our discretion to construe the appeal as an appeal from the judgment. (See *Tillery v. Richland* (1984) 158 Cal.App.3d 957, 962.)

[7] Appellants elected to prepare an appellant's appendix (Cal. Rules of Court, rule 5.1) and to designate only a portion of the oral proceedings to be transcribed. Curiously, appellants did not designate the evidentiary portion of the oral proceedings at trial.

unreported trial testimony would demonstrate the absence of error. (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) Our review is limited to errors that appear on the face of the record. (See Cal. Rules of Court, rule 52; *Eby v. Chaskin* (1996) 47 Cal.App.4th 1045, 1048, fn. 4.)

In addition, appellants did not request that the trial court issue a statement of decision and none was provided. Where the parties have failed to request a statement of decision, all legal and factual inferences must favor the ruling made below. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792; see *Walling v. Kimball* (1941) 17 Cal.2d 364, 373.) We thus presume the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record, and indulge all presumptions in favor of its decision. (*Michael U.,* at pp. 792-793.)

Since the record before us does not establish the amount of rent appellants paid or the work they performed on the lease premises, we indulge these presumptions in support of the judgment and conclude appellants have failed to meet their burden of establishing error by an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141.)[8]

B. *Waiver*

Next, appellants assert that as a matter of law and pursuant to the express terms of the lease, respondent waived any right to claim a termination of the lease by continuing to accept in excess of $200,000 in rent from appellants after appellants defaulted on their lease obligations. Despite appellants' claim that undisputed evidence was presented at trial that throughout this litigation respondent cashed rent checks from appellants which exceeded $200,000, appellants have failed to provide a record establishing the amount of

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8 We reject appellants' assertion that respondent should have filed her own reporter's transcript designation to establish the evidence presented at trial. Only where an appellant establishes error which gives rise to a presumption of prejudice, does the burden shift to the respondent to overcome the presumption by presenting a record sufficient to sustain the trial court's decision. (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 683.) Here, appellants failed to overcome the presumption that the trial court's decision is correct by providing a record establishing error.

rent paid.[9] Consequently, we reject appellants' claim that respondent elected to waive appellants' alleged breach of the lease provisions regarding improvements.

C. *Pursuit of Damages*

Appellants also assert that the lease permits recovery of rent and damages *or* termination of the lease for a breach, and respondent's pursuit of damages constituted an election of remedies under the lease, barring their request for termination of the lease. In support of this claim, appellants rely on cases which hold that "Damages and restitution are alternative remedies and an election to pursue one is a bar to invoking the other." (*Alder v. Drudis* (1947) 30 Cal.2d 372, 383; *Jozovich v. Central California Berry Growers Assn.* (1960) 183 Cal.App.2d 216, 228-229.) Appellants' claim of error is misplaced.

The remedy of damages for breach of contract is inconsistent with the remedy of contract rescission. (Civ. Code, § 1692; *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal.App.3d 628, 642-643.) Because these remedies are inconsistent, a plaintiff cannot recover a judgment based on both rescission and damages. However, a plaintiff may seek recovery based on rescission or damages in the alternative, and generally need not elect between the remedies until the case has proceeded through trial and all the evidence is presented. (*Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 915; 12 Miller & Starr, Cal. Real Estate, (3d ed. 2001) § 34:3, p. 16 and cases cited therein.) "[W]hile Civil Code section 1692 provides that a *claim* for damages is not inconsistent with a *claim* for relief based on rescission, the complete relief contemplated under that section may not include duplicate or inconsistent items of *recovery*. (Civ. Code, § 1692.)" (*C. Norman Peterson Co.*, at p. 643.) Appellants have not asserted that respondent received a double recovery in both damages and termination, and the judgment expressly states that respondent was denied any recovery in damages.

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[9] The two pages in the reporter's transcript cited by appellants do not provide evidence of the amount of rent allegedly paid by appellants during the litigation.

Appellants have failed to establish that respondent waived her right to terminate the contract by alternatively pursuing recovery in damages.

D. *Notice*

Appellants contend that respondent's service of the three-day notice to quit, which demanded termination of the lease and the return of possession to respondent in three days, did not satisfy the notice requirement of lease provision 17.1 which provides appellants with at least 30 days to cure an alleged default before an election can be made by respondent to terminate the lease. They also argue that the three-day notice to quit was dated March 6, 2001, approximately 15 months *after* respondent's original complaint was filed. Consequently, they argue that due to the insufficient notice, termination of the lease was error.

Lease provision 17.2 gives respondent the right to exercise any legal or equitable remedy, including termination of the lease, in the event of any material default or breach by appellants set forth in provision 17.1. Lease provision 17.1.3 provides that appellants are in material default and breach of the lease if they fail "to observe and perform any other provision of this lease to be observed or performed by [appellants], where such failure continues for thirty (30) days after written notice thereof by [respondent] to [appellants]." The lease is silent as to the form of the written notice to be given.

We conclude that although the written notice of appellants' default was entitled "three-day notice to quit," it provided adequate written notice pursuant to lease provision 17.1.3 by adequately informing appellants of their default of the lease. The three-day notice to quit states that appellants were in default by violating lease provisions 7.1, 8.2, 18.1 and 21.1.[10] It also states that respondent "requests to declare the tenancy terminated and a termination of the lease is desired." Based on the record before us, we are entitled

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10 Lease provision 7.1 in relevant part provides that but for the Exhibit B improvements, appellants are not required to make changes whose estimated cost is in excess of $5,000. Lease provision 8.2 provides that appellants are responsible for maintenance and repair of the leased premises. Lease provision 18.1 concerns assignment and subletting of the lease. Lease provision 21.1 concerns appellants' responsibility for the physical upgrade of the leased premises pursuant to Exhibit B.

to presume that appellants were served with the three-day notice to quit on March 6, 2001, and that, after receiving the March 6, 2001 notice, appellants did nothing to cure their default, resulting in respondent's filing of the amended complaint three months later based on appellants' failure to perform the required upgrade. Appellants have failed to demonstrate that the court's implied finding of the adequacy of the 30-day written notice was erroneous.[11]

E. *Respondent's Conduct*

Appellants next assert that the court erred in terminating the lease because the evidence established that respondent engaged in an aggressive pattern of disrupting appellants' ability to obtain a subtenant, including the filing of the instant action. Resolution of this claim involves a review of the evidence and appellants have failed to designate a reporter's transcript of the oral evidence presented at trial. The claimed error is not apparent on the face of the record before us, and the judgment is conclusively presumed correct on all evidentiary matters. Thus, once again, appellants have failed to demonstrate error by providing an adequate record.

F. *Pleading*

Finally, appellants argue that the court erred in terminating the lease because termination was not pled in respondent's sixth cause of action, "the only cause of action

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11 Appellants seem to suggest that simply because the three-day notice was served post-complaint, it could not constitute valid notice under the lease. Because appellants have failed to support this argument with any reasoned argument or citation to legal authority, we treat the issue as waived. (Cal. Rules of Court, rule 14(a)(1)(B).)

For the first time at oral argument, appellants argued that because the three-day notice demanded their termination of the lease in three days, it could not reasonably be construed as providing them 30 days to cure their default. However, the three-day notice does not unequivocally demand termination of the lease in three days. Instead, it provides three days' notice "to quit the premises and to turn possession over to [respondent]," and states that respondent "requests to declare the tenancy terminated and a termination of the lease is desired." In any event, any claim by appellants that the three-day notice led them to understand that they had to undertake reasonable steps to cure the default within three days and that this could not be done founders for lack of any evidence to this effect in the record.

[respondent] arguably prevailed on." They argue that they had a right to rely on the pleadings in assessing what evidence to produce at trial and would have presented additional material evidence had the issue of termination been litigated at trial. They assert that "In the facts of this case, termination of the lease was not litigated as to the sixth cause of action," and "evidence relating to termination of the lease was not adjudicated during the evidentiary phase of the trial."

Once again, appellants' failure to provide us with a record of the evidentiary phase of trial precludes our review of their claim regarding what occurred during that phase. While the sixth cause of action for breach of lease does not itself seek termination of the lease, it incorporates by reference paragraph 14, contained within the third cause of action for declaratory relief, which provides, in part, "[Respondent] contends that the actions of [appellants] are in violation of the express and implied terms of the Lease, entitling it to damages, an injunction and to terminate the Lease." In addition, the amended complaint's prayer requests "A judgment terminating [appellants'] interest in the premises and restoring possession thereof to [respondent]." Based on such pleading, appellants' claim of surprise that lease termination was sought seems disingenuous.

II. *Attorney Fees*

Appellants contend respondent was not entitled to attorney fees since she was not the prevailing party under the contract.

Following trial, the court stated in its February 2003 order that either party could bring a motion to be determined the prevailing party for purposes of attorney fees. Respondent sought attorney fees of $184,757 pursuant to Civil Code section 1717,[12] asserting she was the prevailing party because the court ruled she was entitled to termination of the lease and back rent,[13] and denied appellants any recovery on their

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[12] Civil Code section 1717 provides in part: "The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section." (Subd. (b)(1).)

[13] Although the court's February 2003 written order following trial ordered appellants to pay respondent rents due and owing from "the date of the last hearing through the date of

cross-complaint. The June 2003 judgment awarded respondent $80,000 in attorney fees and costs against appellants. The record does not contain a transcript of the hearing on respondent's attorney fee motion and does not disclose the court's findings or reasoning of the trial court regarding attorney fees.

A. *Prevailing Party*

Appellants oppose the attorney fee award on alternative grounds: (1) they were the prevailing party because they prevailed on eight of the nine causes of action in the complaint; or (2) there was no prevailing party.

Where, as here, neither party achieves a complete victory on all the contract claims, the trial court has discretion to determine which party prevailed on the contract, or whether neither party prevailed sufficient to justify an award of attorney fees. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) This discretion will not be reversed on appeal absent a clear showing of abuse. (*Jackson v. Homeowners Association Monte Vista Estates-East* (2001) 93 Cal.App.4th 773, 789.) Moreover, the judgment impliedly finding respondent the prevailing party and awarding her attorney fees is presumed correct and all intents and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Here, respondent prevailed on her breach of contract cause of action that resulted in termination of the lease, despite being denied damages. Appellants presumably succeeded in convincing the trial court to deny respondent damages, but failed to prevail on any claim in their cross-complaint. On the record before us, the court properly exercised its discretion to determine that respondent was the prevailing party and appellants have failed to demonstrate any abuse of discretion.

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this hearing," the subsequent judgment denied respondent any recovery of damages on her complaint.

B. *Amount of Attorney Fees*

Appellants contend that the $80,000 in attorney fees awarded was excessive since the only result obtained by respondent was termination of the lease.

" 'The amount of an attorney fee to be awarded is a matter within the sound discretion of the trial court. [Citation.] The trial court is the best judge of the value of professional services rendered . . . , and while its judgment is subject to our review, we will not disturb that determination unless we are convinced that it is clearly wrong.' [Citation.] A challenge to the amount of the award is upheld only if that amount 'is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination.' " (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 404, quoting *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134.)

Appellants assert that a review of the "alleged bills" attached to respondent's counsel's declaration in support of attorney fees shows the "extreme wastefulness in the improper requests for fees against appellants in unnecessary matters, non-contractual claims and matters which related to the other case of NB3 Inc." Thus, appellants argue that the fees awarded should have been substantially lower than the $80,000 awarded.

Respondent's counsel's declaration contains bills verifying nearly $185,000 in attorney fees. The record does not disclose how the trial court arrived at its determination to award less then one-half of that amount. We presume in support of the judgment that the court had the requisite evidence necessary to make its discretionary determination regarding the amount of attorney fees awarded to respondent. Appellants have failed to demonstrate that the attorney fee award was erroneous.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

GEMELLO, J.